

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF MASSACHUSETTS

Tony B GASKINS et.al

C.A NO. 05-11230-JLT

v.

KATHLEEN DENNEHY et.al.

Defendants.

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT
OF MOTION FOR A EMERGENCY T.R.O OR/
ALTERNATIVELY P.I APPLICATION

STATEMENT of CASE:

THIS IS A CIVIL ACTION BROUGHT BY PLAINTIFFS UNDER 42 U.S.C § 1983 FOR ADEQUATE LAW LIBRARY ACCESS OR LEGAL ASSISTANCE, LEGAL SUPPLIES WITHIN THE DEPARTMENT OF DISCIPLINARY UNIT (DDU) AMONG OTHER ABRIDGEMENTS OF PLAINTIFFS ACCESS TO THE COURT. PLAINTIFFS SEEK A T.R.O. / P.I AGAINST DEFENDANTS OBSTRUCTING THEIR ACCESS TO THE COURTS VIA RESTRICTING ATTORNEY CALLS AND TO RECEIVE ADEQUATE WRITING PENS TO MAKE / FILE COURT PROCEEDINGS.

STATEMENT of FACTS:

1. ON OR ABOUT 11/26/04, DEFENDANTS ISSUED NOTICE ORDER CONFISCATING ALL REGULAR PENS FROM PRISONERS HOUSED IN 10 BLOCK AND DDU SEGREGATION UNITS. THIS AROSE FROM AN ISOLATED INCIDENT WITH A PRISONER. SINCE THE OPERATION OF BOTH SEGREGATIVE UNITS REGULAR PENS HAVE BEEN PERMITTED.

2.

2. THE NEW PENS ARE SMALL RUBBER TUBES FLEXIBLE WITH INK. A PRISONER CANNOT GRIP THESE PENS TO DO ANY EXTENSIVE WRITING BEYOND SIGNING HIS NAME. THE PEN HAS TO BE STABILIZED TO USE WHICH HURTS THE FINGERS DURING USAGE FOR ANY PERIOD OF TIME. SEE DECLARATIONS ATTACHED.

3. PLAINTIFFS ARE ENTITLED TO UNRESTRICTED ATTORNEY CALLS PURSUANT TO G.L.C. § 27B 99. DEFENDANTS THROUGHOUT THE DEPARTMENT OF CORRECTIONS SEGREGATION UNITS HAVE PERMITTED ATTORNEY CALLS UNLIMITED UPON REQUEST BY A PRISONER. WHICH WAS VERIFIED BY OFFICIALS VIA DIALING THE ATTORNEY CALLS OR CHECKING THE LAWYERS DIARY.

4. PLAINTIFFS CONFINED IN DDU HAVE TO HAVE THEIR ATTORNEYS CALL UP TO SCHEDULE AN ATTORNEY CALL OR SEND A LETTER MAKING A REQUEST TO BE PERMITTED TO SPEAK WITH THEIR CLIENTS. THE NEED FOR ATTORNEY CALLS IS CENTERED AROUND THE ATTORNEY'S ACCESS AS OPPOSED TO PRISONERS ACCESS.

5. HUDSON'S ATTORNEY BENJAMIN GOLDBERGER INFORMED SUPERINTENDANT NOLAN THAT CONTINUAL ACCESS TO THE PHONE WAS NEEDED. ATTACHED B-2-7 HUDSON'S CRIMINAL ATTORNEY ~~GREG~~ HUBERT INFORMED NOLAN OF HIS CONTINUAL TO CONFER WITH HUDSON DURING THE CRIMINAL APPEAL. ATTACHED HERETO AS EX B-10. ATTORNEY EVA CLARK, HUDSON'S STAND BY COUNSEL ON A CIVIL MATTER INFORMED MS. DENVEY OF THE NEED OF CONTINUAL PHONE ACCESS EX. B-8.

6. GASKIN'S ALSO HAD HIS CRIMINAL ATTORNEY JOHN BARTER CONTACTED MR. NOLAN REGARDING THE CONTINUAL NEED TO CONFER DURING THE APPEAL MATTER. EX. B-11 ATTORNEY PATRICIA GARIN WAS INFORMED BY OFFICIALS THAT NO POLICY EXISTED. HUDSON AND GASKIN'S WERE PERMITTED PHONE ACCESS UPON THEIR REQUEST TO PRISON STAFF. SEE CAPTAIN BROWN'S RESPONSE TO HUDSON OUTLINING THE POLICY. ATTACHED AS EX. B-1 & B-13.

7. ON OR ABOUT MAY 17, 2005, MR. NOLAN REQUIRED ALL PRISONERS TO USE THEIR EARNED PHONE SLIPS FOR PERSONAL CALL ON ATTORNEY CALLS. THE PRESENT POLICY REQUIRES THAT PLAINTIFFS EARN TELEPHONE ATTORNEY CALLS AS OPPOSED TO POSSESSING THE RIGHT TO CALL THEIR ATTORNEY. ATTORNEYS CALLS IS A RIGHT, NOT A PRIVILEGE. See EX. B-4

ARGUMENT:

IN DETERMINING A TRO. OR / P.I. APPLICATION, COURTS GENERALLY CONSIDER SEVERAL FACTORS: IRREPARABLE HARM; BALANCE OF HARDSHIP, LIKELIHOOD OF SUCCESS ON THE MERITS; AND PUBLIC INTEREST. EACH FACTORS FAVOR THE GRANT OF THIS MOTION.

A: THE PLAINTIFF IS THREATENED WITH IRREPARABLE HARM

PLAINTIFFS ARE BEING DENIED ADEQUATE LEGAL MATERIALS, PROPER PENS TO DRAFT THEIR LEGAL DOCUMENTS LEDGIBY FOR FILING WITH THE COURTS, GRIEVANCES, OR LETTERS TO GOVERNMENTAL OFFICIALS. DEFENDANTS ACTION OF SEVERELY RESTRICTING PLAINTIFFS ATTORNEY PHONE CALLS IS IMPEDING THEIR ABILITY TO CONFER WITH THEIR COUNSELS EFFECTIVELY DURING THE PENDENCY OF CRIMINAL AND CIVIL CASES. SUCH CONDUCT BY DEFENDANTS ARE A CLEAR VIOLATION TO EFFECTIVE ACCESS TO THE COURTS. THEREBY VIOLATING PLAINTIFFS FIRST AMENDMENT RIGHTS AND REGULATORY PROVISIONS; 14TH AND 6TH AMENDMENT RIGHTS TO THE U.S. CONSTITUTION.

AS A MATTER OF LAW, THE CONTINUING DEPRIVATION OF CONSTITUTIONAL RIGHTS TO EFFECTIVE ACCESS TO THE COURTS CONSTITUTES IRREPARABLE HARM. BOUNDS V. SMITH, 430 U.S. 817, 822 (1977); SOWELL V. VOSE, ELROD V. BURNS, 427. U.S. 347 (1976)

THIS PRINCIPLE HAS BEEN APPLIED IN PRISON LITIGATION. NEWMAN V NORRIS, 888 F.2d 371, 378 (1989); MITCHELL V. CUOMO, 748 F.2d 804, 806 (2nd. CIR 1984); ALBRO V. COUNTY OF ONONDAGA, 627 F. Supp 1280, 1287 (N.D.N.Y. 1986); WILLIAMS V. LANE, 646 F. Supp 1379, 1409 (N.D. ILL. 1986)

IN addition, PLAINTIFFS HAVE SEVERAL ONGOING LITIGATION among Pending CRIMINAL and CIVIL CASES OR appeals. See DECLARATIONS IN SUPPORT. WHICH THREATEN THEM WITH THE INJURY of being UNABLE TO MEET COURT DEADLINES.

B. THE BALANCE OF HARDSHIP FAVORS THE PLAINTIFFS

IN THIS CASE, THE PRESENT CONSTITUTIONAL deprivation of effective access TO THE COURTS OUTWEIGHS any alleged suffering by DEFENDANTS. THE suffering DEFENDANTS WILL experience is HAVING TO COMPLY WITH THE G.L.C. 2 2 § 99, 103CMR. 482. IN PERMITTING PLAINTIFF ATTORNEY CALLS UPON THEIR REQUEST and NEED TO CONFER WITH ATTORNEYS AS IS THE PRACTICE THROUGHOUT THE ENTIRE DEPARTMENT OF CORRECTIONS. See DECLARATIONS PARA. 5-6, 1-4

DEFENDANTS DO NOT experience any HARDSHIP by supplying PLAINTIFFS WITH PROPER adequate pens TO LITIGATE THEIR legal issues. WHICH IS MANDATED BY THE CONSTITUTION. THEREFORE THE FAVOR OF HARDSHIP FAVORS PLAINTIFF. Bounds v. SMITH, supra AT 821. MITCHELL v CUOMO, supra AT 708, DURAN v ANAYA supra. AT

C. PLAINTIFF'S WILL LIKELY SUCCEED ON THE MERITS

PLAINTIFFS HAS A GREAT LIKELIHOOD OF SUCCESS ON THE MERITS. WHAT DEFENDANTS HAVE done by MAKING PLAINTIFFS earn PROTECTED CONSTITUTIONAL RIGHTS TO MAKE ATTORNEY CALLS AS OPPOSE TO ENSURING THE RIGHT AS NEEDED IS VIOLATE 103CMR. 482.08. (1) INMATE TELEPHONE USE FOR COURT, ATTORNEY CONTACT: WHICH STATES:

- (1) TELEPHONE CALLS TO PRE-AUTHORIZED ATTORNEY NUMBERS SHALL NOT be SUSPENDED OR CURTAINED EXCEPT IN AN INSTITUTIONAL EMERGENCY. TELEPHONE CALLS TO PRE-AUTHORIZED ATTORNEY NUMBERS SHALL NOT be SUBJECTED TO TELEPHONE MONITORING OR RECORDING.

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THE REGULATORY PROVISIONS ARE GROUNDED IN THE STATUTE G.L.C. 272 § 99, WHICH PROHIBITS PRISON OFFICIALS FROM OBSTRUCTING A PRISONERS TELEPHONE ACCESS TO THE COURTS. IN THAT VEIN, THE SUPERINTENDANT CANNOT SUSPEND OR CURTAIL PLAINTIFFS CONSTITUTIONAL PROTECTED RIGHTS TO ATTORNEY CALLS. SEE 103 CMR. 482.07 (4) SUSPENSION PROVISION CITES IN RELEVANT PARTS:

[TELEPHONE CALLS TO COURTS AND ATTORNEY SHALL NOT BE SUSPENDED]

HERETO ATTACHED AS EXHIBIT E THE POLICY EMPLOYED BY DEFENDANTS ARE ACTUALLY GOVERNING PERSONAL PHONE CALLS. SEE ORIENTATION DDU ATTACHED PG. F WHERE PLAINTIFFS MUST EARN THEIR SLIPS BASED ON GOOD BEHAVIOR IN ORDER TO MAKE PERSONAL PHONE CALLS. PERSONAL AND ATTORNEY CALLS ARE CLEARLY DISTINGUISHED AS TWO DIFFERENT ENTITIES. BY LAW AND PROMULGATED REGULATIONS 103 CMR. 482.08 ET. SEQ. AND IBID 09. ET. SEQ. PERSONALS BEING DISCRETIONARY, AND LEGAL CALLS ARE NONDISCRETIONARY. THEREFORE DEFENDANTS PRESENT PRACTICE IS CURTAILING PLAINTIFFS EFFECTIVE ACCESS TO THEIR ATTORNEYS. PLAINTIFFS ATTORNEY CALLS OR COURT CALLS SHOULD BE AS EVERY PRISONER'S HOUSED IN SEGREGATION. SEE DECLARATIONS PARA. 5-16 SEE SOULE V. TRAVISANO, 498 F.2d 1120 (1974); WASHINGTON V. RENO, 35 F.3d 1093, 1098-1100 (1994) (PRELIMINARY INJUNCTION GRANTED ON UNREASONABLE RESTRICTION ON ATTORNEY CALLS); PROCTOR V. MARTINEZ, 416 U.S. 468 (1974). ¹¹

SECONDLY, DEFENDANTS ARE CONSTITUTIONALLY MANDATED TO PROVIDE ADEQUATE LEGAL SUPPLIES TO PLAINTIFFS. BOUNDS V. SMITH, SUPRA AT 821, JOHNSON V. AVERY, 393 U.S. 483, 89 S. CT 747 (1969); CASEY V. LEWIS, 43 F.3d 1261 (9TH CIR. 1994). THE PEN IN QUESTION THAT PLAINTIFFS' COMPLAIN OF HAS BEEN EXAMINED BY AT LEAST ONE U.S. DISTRICT JUDGE IN MATTHEWS V. ALLEN, USDC C.A. NO. 01-11910-RWZ

¹¹ THE ABILITY TO COMMUNICATE WITH ATTORNEYS VIA MAIL HAS PROVEN STRAINED. SEE GRIEVANCES AND MAIL COMPLAINTS ATTACHED HERETO AS EXHIBIT D. HUDSON HAS HAD HIS LEGAL & NON-LEGAL MAIL TAMPERED / INTERFERED WITH ON NUMEROUS OCCASIONS. ALSO, THE TIME DELAY IN WHICH IT TAKES TO COMMUNICATE VIA MAIL IS A PROBLEM.

Judge Zobel found THE PENS WANTING. SEE FEBRUARY 28, 2005 ORDER ATTACHED. HERE TO AS EXHIBIT A-1-B DEFENDANTS (THE SAME AS HERE) IN MATTHEW'S CASE RE-ISSUED HIM A REGULAR PEN, RATHER THAN ACCEPTING THAT COURTS INVITATION TO BE HEARD ON THE ISSUE. AS DECLARED IN THEIR STATEMENTS, PLAINTIFFS HAVE ONGOING CRIMINAL AND CIVIL LITIGATION REQUIRING ADEQUATE PENS. SEE PHYSICAL PEN ATTACHED AS EXHIBIT FOR THE COURTS EXAMINATION. DEFENDANTS ARE MANDATED TO PROVIDE ADEQUATE WRITING PENS OTHER THAN THE PRESENT PENS. THEREFORE PLAINTIFFS ARE LIKELY TO SUCCEED ON BOTH CLAIMS.

D. THE RELIEF SOUGHT WILL SERVE PUBLIC INTEREST

THE GRANT OF RELIEF WILL SERVE THE PUBLIC INTEREST BECAUSE IT IS ALWAYS IN THE PUBLIC INTEREST FOR PRISON OFFICIALS TO OBEY THE LAW. DURAN V ANAYA, 642 F. Supp 510, 527. (D.N.M. 1986) (RESPECT FOR THE LAW, PARTICULARLY BY PRISON OFFICIALS RESPONSIBLE FOR THE ADMINISTRATION OF THE STATES CORRECTIONAL SYSTEM, IS IN ITSELF A MATTER OF THE HIGHEST PUBLIC INTEREST) SEE LIEWELYN V. OAKLAND COUNTY PROSECUTOR OFFICE, 402 F. Supp 1379, 1393 (1975) (CONSTITUTION IS THE ULTIMATE EXPRESSION OF THE PUBLIC INTEREST).

PLAINTIFFS SHOULD NOT BE REQUIRED TO POST SECURITY

PLAINTIFFS ARE INDIGENT PRISONERS AND IS UNABLE TO POST SECURITY. THE COURT HAS DISCRETION TO EXCUSE AN IMPOVERISHED LITIGANT FROM POSTING SECURITY. ORANTES-HERNANDEZ V. SMITH, 541 F. Supp 351, 385 N. 3. (1982) J.L. V. PARHAM, 412 F. Supp 112, 140 (1976) REV. ON OTHER GROUNDS, 442 U.S. 584 (1979). IN VIEW: PLAINTIFFS EFFECTIVE ACCESS TO THE COURTS RIGHTS, THIS COURT SHOULD GRANT THE RELIEF REQUESTED WITHOUT REQUIRING THE POSTED SECURITY.

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CONCLUSION

WHEREFORE PLAINTIFFS REQUEST THE FOLLOWING RELIEF:

- A. To Be ISSUED Adequate WRITING PENS.
- B. ORDER PLAINTIFFS be afforded ATTORNEY CALLS UPON REQUEST TO OFFICIALS SEPERATE FROM THEIR EARNED PERSONAL CALLS AS PRACTICED UNIFORMLY BY THE DEPARTMENT OF CORRECTIONS

Respectfully Submitted
PRO-SE

Mac Hudson

MAC HUDSON

P.O. Box 100

SWALPOLE MA 02071

CERTIFICATE OF SERVICE

I, MAC HUDSON, CERTIFY THAT I did
SERVE A TRUE COPY OF THIS MOTION ON
NANCY WHITE CHIEF COUNSEL AT 70 FRANKLIN
ST. BOSTON MA 02110-1300 VIA FIRST CLASS
MAIL

Mac Hudson

DATE:

Tony Gaskins

TONY GASKINS

P.O. Box 100

SWALPOLE MA 02071

Orrin Simmons

ORRIN SIMMONS

P.O. Box 100

SWALPOLE MA 02071

Carl Odware

CARL ODWARE

P.O. Box 100

SWALPOLE MA 02071

Prince Moses

PRINCE MOSES

P.O. Box 100

SWALPOLE MA 02071

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Carl Odware

CARL ODWARE

P.O. Box 100

S.WALPOLE MA 02071

Jeff Hardy

JEFFREY HARDY

P.O. Box 100

S.WALPOLE MA 02071

Michael Keuhane

MICHAEL KEUHANE

P.O. Box 100

S.WALPOLE MA 02071

Zakarya Bush

ZAKARYA BUSH

P.O. Box 100

S.WALPOLE MA 02071

Steven Jacobbe

STEVEN JACOBBE

P.O. Box 100

S.WALPOLE MA.

Trevor Higgins

TREVOR HIGGINS

P.O. Box 100

S.WALPOLE MA 02071

Samuel Correa

SAMUEL CORREA

P.O. Box 100

S.WALPOLE MA 02071

Derrick Tyler

DERRICK TYLER

P.O. Box 100

S.WALPOLE MA 02071